Board of Alien Labor Certification
United States Department of Labor
Washington D.C.

DATE: August 26, 1997
CASE NO: 96-INA-157

In the Matter of:

UNITED TALMUDICAL ACADEMY
Employer

On Behalf of:

ZBIGNIEW KUDELKO
Alien

Appearance: Paul W. Janeszek
New York, New York
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the

place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27(c).

Statement of the Case

On April 25, 1994, United Talmudical Academy ("employer") filed an application for labor certification to enable Zbigniew Kudelko ("alien") to fill the position of Cook at an hourly wage of $10 (AF 4). The job duties are described as follows:

> Prepare, season, and cook soups, meats, vegetables according to the Kosher dietary requirements. Bake, broil, and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls. Decorate dishes according to the nature of celebration. Purchase foodstuff and accounts for the expenses incurred. (AF 4).

The job requirements are a high school diploma and two years of experience in the job offered (AF 4).

On November 2, 1995, the CO issued a Notice of Findings proposing to deny the labor certification. The CO cited a violation of § 656.24 (b) (2) (ii) which states that a CO shall consider a U.S. worker qualified for a job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner the duties involved in the occupation. Section 656.21(b) (6) further provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful job-related reasons. The CO alleged that the employer failed to provide lawful, job-related reasons for the rejection of David Wesley Lucks, Carlton Ladson, Clifton Christopher, and Praimnath Basdeo (AF 70). The CO also challenged the employer's compliance with § 656.21 (g) which requires an employer to place an advertisement for the job opportunity in a newspaper of general circulation. The CO requested that the employer submit a copy of the tearsheet advertisement.

In rebuttal, dated November 28, 1995, the employer argued that all U.S. applicants were lawfully rejected. The employer stated that Mr. Wesley and Mr. Christopher were not offered interviews because their resumes did not indicate they possessed the required experience (AF 91). Mr. Ladson was rejected because he did not appear for an interview the employer scheduled, and Mr. Basdeo was interviewed over the phone and subsequently rejected because he only possessed one year of experience in the offered position. Despite the employer's claim that only one of the

[1] All further references to documents contained in the Appeal File will be noted as "AF."

four applicants was qualified, all four were contacted by certified letter, and invited in for an pre-scheduled interview (AF 89). In response to the advertising issue, the employer submitted several copies of its tearsheet from *The Daily News* (AF 75).

On December 14, 1995, the CO issued the Final Determination denying certification. The CO determined that the employer adequately rebutted the tearsheet issue, but continued to dispute the employer's rejection of the four U.S. applicants. The CO found that all four of these applicants were qualified for the position, and that the employer failed to demonstrate lawful, job-related reasons for their rejection (AF 116). On January 17, 1996, the employer requested administrative review of Denial of Labor Certification (AF 118).

Discussion

The issue presented by this appeal is whether the employer provided lawful, job-related reasons for rejecting four U.S. applicants. Generally, an employer must show that U.S. applicants are rejected solely for lawful, job-related reasons. *§ 656.21 (b) (6)*. Furthermore, the job opportunity must have been open to any qualified U.S. worker. *§ 656.20 (c) (8)*. Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. *§ 656.2 (b)*.

Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. *Gorchev & Gorchev Graphic Design*, 89-INA-118 (Nov. 29, 1990) (*en banc*). A broad range of qualifying experience indicates that the applicant may meet the job requirements. The fact that a resume does not list all of the requirements for the position does not excuse the employer's failure to contact the applicants. *GE Aircraft Engines*, 89-INA-12 (Apr. 20, 1990).

In this case, the employer is a religious institution which seeks a cook to prepare meals for its congregation, and residents who live in the dormitory which it operates. As a result, the CO properly classified the position on Form ETA-750 as Institutional Cook as defined by the Dictionary of Occupational Titles # 315.361-010. *See D.O.T., Fourth Ed. (1991)*. The experience of Applicants Ladson and Lucks indicate broad experience as institutional cooks which therefore mandates that the employer further investigate their qualifications. Mr. Ladson has over 15 years of experience as a cook with a nursing home, hospital, and correctional facility (AF 52). Additionally, Mr. Ladson's resume indicates that he has experience in Kosher cooking. The employer, however, rejected this applicant on the grounds that he did not meet the stated requirements, and that he failed to respond to a certified letter dated March 9, 1995 informing him that he had been scheduled for an interview on March 20, 1995. The CO also noted that Applicant David Lucks possesses three years of experience as a cook in the Food Service Department at a local hospital. The employer rejected this applicant because he failed to respond

to a certified letter dated March 10, 1995 informing him that he had been scheduled for an interview on March 20, 1995 (AF 81).

We find it significant that the employer did not submit a signed receipt of mail received as requested (AF 114). Moreover, in response to state employment agency inquiries, Applicants Ladson and Lucks indicated that they were never contacted by the employer (AF 46, 54). Viewing the evidence as a whole, we believe the employer did not recruit in good faith and failed to fulfil its duty of investigating these applicants adequately. As a result, we conclude that the employer did not carry its burden in demonstrating that these applicants were rejected for lawful, job-related reasons pursuant to § 656.21 (b) (6). Thus, we find labor certification properly was denied.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final

decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and,**(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.